Approved: April 1, 2011
Date

MINUTES OF THE SENATE COMMERCE COMMITTEE

The meeting was called to order by Chairperson Susan Wagle at 8:30 a.m. on March 9, 2011, in Room 548-S of the Capitol.

All members were present.

Committee staff present:
Ms. Margaret Cianciarulo, Committee Assistant
Mr. Ken Wilke, Office of the Revisor of Statutes
Mr. Reed Holwegner, Kansas Legislative Research Department
Ms. Dorothy Noblitt, Kansas Legislative Research Department

Conferees appearing before the Committee:
Mr. Fred Greenbaum, Attorney, McAnay, Van Cleave & Phillips
Ms. Janet Stubbs, Administrator, Kansas Building Industry Workers compensation Fund
Mr. Eric Stafford, Senior Director of Government Affairs, Kansas Chamber of Commerce

Others attending:
See attached list.

Continued Hearing on Substitute for HB2134 – an act concerning workers compensation

Upon calling the meeting to order, the Chair stated at yesterday's Committee meeting they were offered a binder entitled, "Comparison of Substitute for **HB2134** as Passed by the House, **HB2134** Compromise, and Current Law," which was explained by Mr. Fred Greenbaum, Attorney, McAnay, VanCleave & Phillips. She called on him today asking, since he had covered the binder at yesterday's meeting, was he going to cover his written testimony today? He said no, but would offer it as written only. A copy of his written testimony is (Attachment 1) attached and incorporated into the Minutes as written.

The Chair then called on Ms. Janet Stubbs, Administrator of the Kansas Building Industry Workers Compensation Fund (KBIWCF), who stated their operation is a homogeneous group funded pool for the residential and light commercial construction industry of Kansas and is generally in support of this bill. However, she would like to share with the Committee, some of the concerns the KBIWCF regarding the bill including:

1.) Under new Section 3 of the current bill, page 5 under (F), they are concerned how broadly the "just cause" definition will be applied but certainly agree that it is a start in the right direction. She explained a large percentage of construction workers are alcohol and drug users who are eager to avoid a drug test. Some often wait until after work and go to an ER or occupational health facility not normally used by their employer. It is the intent of KBIWCF to require all employees of our members to sign a form granting permission for a post accident drug test when hired. KBIWCF does require new hire drug testing, and to post accident drug tests within 4 to 6 hours after the accident/injury.

2.) The amendment regarding additional drug testing data was requested by them because the techniques have been developed which were not in existence at the time the 1993 statutes were written. She added, labs retain the specimens for one year so there would be no problem with allowing the claimant to have a retest done in the time period allowed. They ask that this amendment be retained in the House version.

3.) Under Section 25 (d), they believe that the House Committee received inaccurate information regarding current translator fee liability. KBIWCF currently sends interpreters to medical appointments and to Court hearings for claimants and accepts that as the cost of employers hiring non-English speaking workers.

4.) Lastly, they believe that 30-days is far too long for reporting an injury and realizes this provision is not going to change, so the members will handle this through the Employer Policy Manual and enforcement procedures. A copy of her testimony is (Attachment 2) attached and incorporated into the Minutes as referenced.

Chairperson Wagle asked Ms. Stubbs where the oral swab for drug testing is in the bill and did the House allow for this? (Page 5 and yes, the House allowed.)

The minutes of the Senate Commerce Committee at 8:30 a.m. on March 9, 2011, in Room 548-S of the Capitol.

The Chair recognized Senator Holland who asked Ms. Stubbs, when she talked about misclassification occurring , is that pretty prevalent? (Yes.)

The Chair then said, is she correct in saying that the testimonies of Mr. Gary Terrell, Attorney, Kansas Association of Defense Council; Mr. Bernie Koch, Executive Director, Kansas Economic Progress Council; and Mr. Kevin McFarland, President, Kansas Association of Homes and Services for the Aging (KAHSA) are all written and they did not wish to testify? (Each answered yes.) Copies of their testimonies are (Attachment 3) attached and incorporated into the Minutes as referenced.

The Chair stated, the last person to come before the Committee to testify was Mr. Eric Stafford, Senior Director of Government Affairs, Kansas Chamber of Commerce who said their coalition of business organizations support this bill in both forms: the version which passed the House, as well as the original compromise and will leave it to the will of the Committee as to which version to accept. He did say that nothing in the compromise agreement was removed by the House, only additions were made.

Mr. Stafford also cited several court cases which significantly altered the intent of the work comp system including the *Fernandez* case being corrected stating, you must be eligible for a valid contract of employment to be eligible for work disability.

Lastly, he stated while these are a few of the positive changes for employers, they also focus on the changes taking place in this legislature which benefit the injured worker. The business community was willing to increase caps to benefit legitimately injured workers. This legislation raises the Permanent Partial and Permanent Total caps by $30,000 each and the death benefit also increasing from $250,000 to $300,000.

Next, he then went through the amendment covering some changes that need to be made, which they consider probably technical in nature, including:

1.) The balloon that was included in Mr. Greenbaum and Mr. Andersen's testimony, anything in yellow or highlighted is a Department of Labor/Department of Insurance amendment.

2. To get this bill back to its original form, they have struck the House language so the majority of the language in red are amendments added by the House that we are removing from the bill. This is language clean up as seen on page 6, lines 34 through 36, where the Department of Health and Human Services and the Department of Health and Environment have been capitalized. However, per Mr. Ken Wilke, Kansas Legislative Research Department, it is not necessary to capitalize these. Any language that is black that is stricken, is the way it stands in the bill, and the existing statute that is being deleted. Also, any black italicized language is just from the base bill. The blue language is what they are adding. They did make a change dealing with the compensation rates and also tweaked the definition of the "prevailing factor." He said this essentially goes back to the compromise with the amendments from the Departments of Labor and Insurance.

3.) In going through each of the Department of Labor's requested changes or concerns from yesterday's hearing, he said all have been addressed with the exception of:

a.) Deleting the Department of Insurance's section, the subcontractor or sole proprietor waivers that is New Section 3 and offered in the balloon with Mr. Stafford's testimony yesterday. So if that were going to be deleted, that would have to be New Section 3, on page 2, which would have to be stricken from the bill.

b.) The change on page 56, line 12, where the red "or injury" is stricken, they actually need to delete "accident" and replace it with the word "injury" so line 12 would read, "to the date of the injury and subject to the maximum weekly."

Lastly, he stated these are two changes to the balloon they brought to satisfy all the points in the Department of Labor's testimony and one technical clean up. A copy of his testimony is (Attachment 4) attached and incorporated into the Minutes as referenced.

The minutes of the Senate Commerce Committee at 8:30 a.m. on March 9, 2011, in Room 548-S of the Capitol.

The Chair then asked for questions or comments from the Committee which came from Senators Masterson, Wagle, and Holland including

1. The only two changes you propose to this is in K.S.A. 44-536, changing "or injury" and then you referenced new Section 3. Could you clarify this New Section 3 for me? (It is striking the entire new section.)

2. This has some technical clean up in it and are House changes, so we can negotiate in conference, and is this just a technical change in new Section 3? (It is striking the amendments in the Department of Labor's testimony yesterday to be consistent to what they like to see changed. It is his understanding their concern was the language included did not fix the problem that exists today.)

3. For clarification, the question was asked if Mr. Greenbaum's side and Mr. Andersen's side are familiar with this and are good to go with this balloon in New Section 3? (Yes, and they also agree with the two recommendations just offered.)

The Chair recognized Ms. Kathie Sparks, Deputy Secretary, Department of Labor, who referred the Committee to page 2, New Sec. 2, line 2, "An employer or self-insured employer "may" provide." The DOL asks that this be changed to "shall" provide, making it mandatory. The other amendment was brought to Committee yesterday from Secretary Brownlee on how we elect the Board.

The Chair asked, is the Secretary willing, if the Committee adopts the DOL's amendment, to also allow those individuals to be appointed by the Secretary and undergo Senate confirmation hearings? (We think that would be okay, but one issue that we would change is the appointment process, people who are subject to Senate confirmation cannot take action on their Board until they have actually been confirmed.)

The Chair recognized Senator Emler who stated there are some Senate confirmations that are not permitted to act. An example being, the person who is there continues to act until the successor is not only appointed but confirmed. He went on to say, if it is during the summer, then the Confirmation Oversight Committee handles. And in this instance, an example would be, we have an Acting Fire Marshall right now and he does not have to be confirmed and is permitted to act as long as he has the letter of authority that he is the Fire Marshall. However, you are not allowed to be "Acting" for more than 6-months. Deputy Secretary Sparks stated all that they would ask is that language be added so that person can be "Acting" until they are confirmed even if only for that period of time.

The Chair recognized Senator Steineger who asked if it was necessary that these people be confirmed by the Senate? Senator Emler was called on. He said this was discussed yesterday afternoon whether or not this would impact the entire bill. The idea behind this methodology was that prior to this, it goes back to a political situation, depending on who was on the second floor. This new methodology would take heavy politics out of it and there would be some group that had some oversight over who actually could get appointed. Under the current system of judges, it is very similar to what is being done in workers comp., i.e. there is a panel that recommends three names from which the judge is chosen. If you do away with the panel you still have to have some oversight.

The Chair then called on Mr. Reed Holwegner, Office of the Revisor of Statutes, who has informed her of some clarifications on what is in this amendment and what she thinks their intentions are. Mr. Holwegner stated when the House worked this bill and it came to the Senate, one of the House provisions was the deletion of an Work Force Advisory Council that was repealed. He asked, is this also being asked to be repealed in this amendment? Mr. Stafford stated this was requested by the House and they would recommend being consistent with taking that out.

The Chair asked if this needed to be added to this package? (Mr. Holwegner said this would have to be stricken in Section 28, page 62, line 21, the last statutory citation, 44-596 and said this was a House amendment.)

Senator Steineger made a motion to move that the Committee adopt the amendment of Mr. Eric Stafford, with the appropriate change that staff has just pointed out, the appropriate deletion on page 62. It was seconded by Senator Lynn.

The minutes of the Senate Commerce Committee at 8:30 a.m. on March 9, 2011, in Room 548-S of the Capitol.

The Chair recognized Senator Emler who stated two things to consider, which he can make as a substitute motion. Referring to page 2, line 2, there seems to be an agreement that "may" can be changed to "shall,"is there any real opposition? (Not a problem with the language that is written here, it is just a matter of explaining to the employers that this needs to be done.) Also all of Section 3 needs to be stricken as shown on page 2, lines 13 through 38, is that correct? (Yes.) And on page 56, strike the word "accident" and replace it with "injury", correct? (Yes.) Lastly, Senator Emler asked Mr. Holwegner, when he was talking about the deletion on page 62, line 21, was 44-596, was there any place else in the bill where that language is referred? (When the House Committee invoked it in the House, this was the only place it was referenced.) Senator Emler then stated, if agreeable, he would make a substitute amendment that the Committee adopt the above changes along with those additional changes. He felt this would get the Committee where they were headed which was sort of the original agreement with the discussed changes, the technical corrections, etc., but also allows you to conference with the House.

The Chair recognized Senator Holland who referred back to the language changing "may" to "shall" asking was this brought forth by the Department of Labor? (Yes.) Are both the business and labor committee comfortable with this? (Mr. Stafford said they would go with the will of the Committee, Mr. Andersen said it is current law. Mr. Greenbaum thinks "may" is sufficient from the standpoint of what we know is a practical matter in terms of their checks. Ms. Stubbs stated they have cut costs by doing electronic deposits of their TDB checks so not sure if the first letter of notification would be acceptable.

The Chair called on Secretary Brownlee who referred the Committee to Ms. Ann Haught, Acting Director of the Division of Workers Compensation, who stated as it is current law, "may" is good but "shall is better".)

The Chair went back to the motion stating that they are on Senator Emler's amendment he has proposed with some changes. He stated if the "shall" goes in, it does not have to be on or with a check for temporary disability benefits, but still does not address the issue of an electronic transfer as there is no check. So, he said, there would have to be a separate notice that goes out with this statement in it.

The Chair recognized Senator Steineger who asked to withdraw his first motion, offering a new motion that the Committee adopt this balloon with the appropriate deletion of Section 3 on page 2, with the appropriate deletion on page 62, line 21, reference to 44-596, leaving page 56 as is and with respect and authority to the Revisor to correct technical issues. It was seconded by Senator Masterson and the motion carried.

The Chair had recognized both Mr. Stafford, who stated that in speaking with their attorneys, they are comfortable with the word "accident"so it is not necessary to change, and Senator Emler, who added to Senator Steineger's proposed amendment "with authority to the Revisor to correct technical issues."

The Chair then stated they would now address the DOL's request including:

1.) an amendment on the word "shall", saying she had heard no opposition to this change and

2.) an amendment changing the way the judges are appointed

The Chair recognized Senator Masterson who stated when they look at the language, on the "shall" or the "may" it does say on or with a check. So if you electronically transfer that is not a check so he would contend that even if that language is in there, the language would be required in conjunction with electronic checks. Senator Emler stated this could be an issue that could be discussed in conference as well.

The Chair asked Secretary Brownlee if they had the actual language of how they choose judges? The Secretary said after discussion following yesterday's meeting it was accepting Senate confirmation and giving the Revisor authority to add this with the appropriate latitude that the timing work out . And this again can been discussed in conference.

The Chair recognized Senator Emler who made the motion the Committee adopt the recommendation of changing "may" to "shall". It was seconded by Senator Lynn and the motion carried.

Senator Masterson made a motion the Committee adopt the Department of Labor's balloon with Senate confirmation. It was seconded by Senator Lynn.

The Chair recognized Senator Holland who asked if both business and labor had heard this before and did they have a position? (Mr. Anderson said they vehemently oppose because of two things, you won't get as qualified candidates because you are serving at the pleasure of the Governor and we do not have district

court review of what appellate judges do now.) The Chair then asked Secretary Brownlee why she asked for this? (First of all they serve for four years and they are proposing that the Secretary appoint these work comp appeals board judges. She said what she indicated yesterday regarding how the system now works. The two parties, KCCI and Labor, unanimously agreeing on the names they put forward and the Secretary makes the appointment and feels these two entities do not reflect the entirety of the workforce in Kansas.

The Chair again recognized Senator Holland who offered two comments: first, labor and business came together in good faith to bring this before the Committee. Secretary Brownlee should have injected herself to work with these people to get this figured out but is now injecting the amendment at the last minute, Second, he does not feel the Committee understands the appeals board process and the dynamics we are affecting and opposes this amendment.

Again, the Chair reminded the Committee there is a long process, they have had testimony today regarding drug use and things in the House that people still want, so this is a continued discussion. She said they are back on the amendment as proposed by Senator Masterson, seconded by Senator Lynn. The Chair recognized Senator Longbine who asked, does the Senate confirmation give the Revisor latitude to allow technical changes?The Chair asked Senator Masterson if his motion conceptually included this? (Yes.) The Chair then asked for a vote from the Committee and the motion passed. Senator Steineger made a motion to move the bill out of Committee. It was seconded by Senator Olsen and the motion passed.

Adjournment

As it was past adjournment time, the Chair announced the meeting was adjourned. The time was 9:31 a.m.

The next meeting is scheduled for March 10, 2011.

Wednesday

SENATE COMMERCE COMMITTEE GUEST LIST

DATE: March 09, 2011

NAME	REPRESENTING
Fred Sauerbaum	
Scott Heidner	KSIA
Larry Karns	
Eric Stafford	KS Chamber
Robin Pasco Dee	KDOL
Kathie Sparks	KDOL
Carol Cust	KDOL
Anne Haught	KDOL
David Unruh	KDOL
Ashley Sherard	Lenexa Chamber
Xiao Zhang	Senator Olsen
Natalie Bright	KS SHRM
Kent Eckles	KS Chamber
JERRY JOHNSON	KHPA/SSIF
Mike Hall	KHPA
Jim Mass	Spirit AeroSystems
Brad Smoot	AIA / NCCI
[illegible]	SSGRC

SENATE COMMERCE COMMITTEE GUEST LIST

DATE: _____

NAME	REPRESENTING
Dennis Phillips	KSCOFF
Ed Redmon	KSCOFF
Michelle Butler	Cap. Strategies
Ron Seeber	KGFA
Patrick Vogelsberg	Kearney & Assoc.
T.J. Cahill	Senator Pyle
Kathleen Sutton	KSNA
Paige Rattiner	Hein Law Firm

Testimony by:
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Attorney
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Kansas City, KS 66117-0300

March 8, 2011

Testimony before the House Committee on Commerce and Economic Development on HB 2134.

Madam Chair and members of the committee, my name is Frederick J. Greenbaum. I am an attorney with McAnany, Van Cleave & Phillips, P.A., in Kansas City, Kansas. My legal practice primarily involves representing Employers in workers' compensation cases throughout the state of Kansas. I also represent Employers in Missouri workers' compensation matters. I have defended Workers Compensation cases for over 30 years. I am here today on behalf of the Kansas Chamber of Commerce, Kansas Society of Human Resource Management, the Kansas Self-Insurers Association and the Kansas business community to speak largely in support of HB 2134.

The groups I represent support the Compromise Bill which was negotiated by the group of attorneys representing Business and Labor. The groups I represent also support the bill as passed through the House of Representatives. I believe some of the Amendments which passed through the House have merit, but I personally have concerns regarding some of those Amendments.

The last significant workers compensation reform took place in 1993. Since that time, Court decisions have impacted the Kansas Workers Compensation Act and the 1993 changes. Among those are the *Casco, Bergstrom, Tyler, Fernandez, Redd, Mitchell* and the *McCready* cases.

Generally under the Workers Compensation Act, an employer is required to provide workers compensation benefits to an injured employee if the injury "arises out of" and occurs during "the course of" his employment. The Act is a no fault law that provides benefits for injured workers without requiring proof of negligence by the employer. Workers Compensation is the exclusive remedy for work related injuries. The "arises out of" component is meant to require a causal connection between the work and injury. However, Administrative and Judicial interpretation of the Act has resulted in a misguided interpretation of what injuries arise out of work. Further, case law rewards employees for not attempting to work, even if they are capable of doing so.

Senate Commerce Committee
Date: March 9, 2011
Attachment 1

To address these issues and to raise the threshold for entering the workers compensation system, the Compromise Bill was negotiated between Business and Labor. Most importantly, the Bill raises the standard for compensability. Under the compromise, the work incident must now be the "prevailing factor" or the cause of both the accident and the injury. The "prevailing factor" test will require employers to only compensate employees and treat conditions for which the work injury was the prevailing or primary factor in relation to all other factors.

As part of the compromise, the Bill benefits injured employees by changing the method of compensation for bilateral upper or lower extremity injuries to the pre-*Casco* method and raises the statutory maximum compensation that may be awarded to an injured worker, caps that have not been changed since 1993.

The proposed legislation addresses the *Bergstrom* decision. It requires the Court to determine the injured worker's wage earning capability and to impute a post-injury wage for those who have not returned to work. It addresses *Tyler* in that there must be a nexus between the workplace injury and the resulting wage loss; a connection which does not need to exist under the current law. It provides that employees will not be eligible for work disability if they do not have the capacity to enter into a valid contract of employment. It addresses the *McCready* case in that neutral falls or accidents will no longer be compensable. Again, it requires that there must be a causal connection between the work and the accident.

The Bill retains employer choice of physician and closes future medical benefits unless the injured worker proves that future medical care will be required. It provides a procedure for closing future medical after an Award if medical treatment is not used for two years. It provides for dismissal of claims if there has not been a Hearing or an Award within three years, it clarifies the date of accident for repetitive trauma cases and it revises and clarifies the employee's obligation to timely report job related injuries to their employer.

The Act provides work disability benefits only for injured employees who have sustained at least a 10% wage loss and have a whole body disability. The wage loss required to qualify for work disability will not be considered if the worker has been terminated for cause, terminated for economic reasons or for other reasons not related to the injury, or has voluntarily resigned. The Bill adds a new requirement that employees have a minimum percentage of permanent impairment before they are eligible for work disability. It also takes into consideration both pre-existing functional impairment and pre-existing work restrictions in computing benefits.

The overall goal was to provide fairness in the resolution of claims for both employers and employees, to raise the threshold to be entitled to benefits and to provide greater benefits to those who deserve them.

FINAL MATTERS

There is an error in Substitute for HOUSE BILL No. 2134. K.S.A. 44-510e(c)(ii) should read "the employee sustained a post-injury wage loss, as defined in K.S.A. 44-510e(a)(2)(E), ***of at least*** ten (10) percent which is directly attributable to the work injury and not to other causes or factors" (page 25, lines 30-33).

SENATE COMMERCE COMMITTEE
March 9, 2011

Senator Wagle, Senator Lynn, and Members of the Committee:

My name is Janet Stubbs. I am the Administrator of the Kansas Building Industry Workers Compensation Fund, a homogeneous group funded pool for the residential and light commercial construction industry of Kansas in our 19th year of operation. I am appearing today generally in support of Substitute HB 2134.

Those of you who know the construction industry can imagine that our claimants, types of injuries, and experiences are different from those of the school employees, the restaurant, office worker or even manufacturing injuries. I would like to share with the Committee some of the concerns we have regarding the bill.

A high percentage of construction workers are alcohol and drug users. Therefore, we encourage our member companies to be drug free and require new hire drug testing and to do post accident drug tests within 4 to 6 hours after the accident/injury. As you can imagine, some workers are eager to avoid a drug test that they believe will show a positive result and look for ways to avoid this. They often wait until after work and go to an ER or an occupational health facility not normally used by their employer. It is the intent of KBIWCF to require all employees of our members to sign a form granting permission for a post accident drug test when hired. As mentioned above, under new section 3 of the current bill, on page 5 under (F), we are concerned how broadly the "just cause" definition will be applied but certainly agree that it is a start in the right direction.

When a serious injury occurs and the injured worker is taken to a hospital ER, the hospital will not work with us on these cases making it impossible to obtain a drug test. Although they take a drug test before administering medication, several reasons are given for not giving a sample specimen or providing us with usable data. This type experience is believed to have cost

Senate Commerce Committee
Date: March 9, 2011
Attachment 2

our Fund several hundred thousand dollars. We ask that a requirement be placed in the law to solve this problem.

We requested the amendment regarding additional drug testing data because drug testing techniques have developed which were not in existence at the time the 1993 statutes were written. There are other types of tests but these are the most common and appropriate for work comp purposes. I might add that the labs retain the specimens for 1 year so there would be no problem with allowing the claimant to have a retest done in the time period allowed. We ask that this amendment be retained in the House version.

Accidents occurring to and from work are another issue for our industry. Many companies allow workers to drive service trucks home at night. We have found that to be problematic and cost us on claims of this type because the ALJ finds that a company logo on the vehicle was of benefit to the company and thus determines it to be a workers compensation claim.

Under Section 25 (e), we believe that the House Committee received inaccurate information regarding current translator fee liability. KBIWCF currently sends interpreters to medical appointments and to Court hearings for claimants and accepts that as the cost of employers hiring non-English speaking workers.

The waiver that was requested by the Kansas Insurance Department has been an issue with our industry for quite sometime. We want to be certain that these waivers prevent insurance carriers from paying claims for which we receive no premium, etc. KBIWCF currently requests our members to require their "Independent Contractors" to purchase a Minimum Premium Policy from the Assigned Risk Pool. I believe that price increased to $1,000 as of 1/1/11. An individual sole proprietor, LLC, or partnership entity participants are automatically excluded from the Act so if they have no payroll for employees, they will receive a refund at the end of the year in the amount of $716. If the entity using the minimum premium policy is an S Corp or C Corp, the owner then has to file a form with the State to take themselves out from under the W.C. Act. Our legal advisors tell us this eliminates the ability of an individual who is a subcontractor of the subcontractor, for example, from coming back against the company which is acting as the "General Contractor".

This is a huge problem for the industry. Small one person shops find the expense onerous and it causes us to lose companies from our Fund.

Last but not least, we believe that 30 days is far too long for reporting an injury. However, I recognize that you are not going to change that provision. Therefore, we will have our members deal with this through the Employee Policy Manual and their enforcement procedures.

Thank you for the opportunity to express our position on this legislation. I would be glad to respond to any questions on issues on which I have not made myself clear.

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Testimony by:
Gary R. Terrill
Attorney
Wallace, Saunders, Austin, Brown & Enochs, Chtd.
P.O. Box 12290
Overland Park, Kansas 66282-2290

March 8, 2011

Testimony before the Senate Commerce Committee on substitute for HB 2134.

Madam Chair and members of the committee, my name is Gary R. Terrill and I am a partner in the law firm of Wallace, Saunders, Austin, Brown & Enochs, Chtd. with Kansas offices in Overland Park and Wichita. My practice exclusively involves defending employers in workers compensation claims. I have practiced in the area of workers compensation for a period of over 30 years. Besides myself, my firm employs 15 attorneys representing the interests of employers in defense of workers compensation claims throughout the States of Kansas and Missouri.

I am appearing before you today on behalf of the Kansas Association of Defense Counsel. KADC is largely supportive of substitute for HB 2134.

I am a part of a group of practicing attorneys who were brought together by the Kansas Chamber of Commerce and Industry, the Kansas Self-Insurers Association, and the Kansas Society of Human Resource Management, to explore needed amendments to the Kansas Workers Compensation Act. As a member of that group, I participated in the drafting of the vast majority of substitute for HB 2134. I was also directly involved in negotiating with attorneys representing organized labor and the Kansas Association of Justice. That negotiation resulted in a Compromise Bill which forms the vast majority of substitute for HB 2134. The Kansas Association of Defense Counsel supports the Compromise Bill which resulted from that negotiation process. The KADC also generally supports the bill as passed by the Kansas House. Many of the House amendments have merit, however, I do have concerns regarding some of the amendments to the original Compromise Bill. Those concerns mirror those reflected in the testimony before this committee of Fred Greenbaum.

The Kansas Workers Compensation Act has undergone no substantial change since the amendments signed into law in 1993. Since 1993, many decisions have been made by the Workers Compensation Administrative Law Judges, the Kansas Workers Compensation Board and the Appellate Courts regarding the construction and

Senate Commerce Committee
Date: March 9, 2011
Attachment 3

application of various parts of the Act. Many of those opinions have resulted in the need for significant modifications to the language in the Act. Examples of such decisions include opinions of the Kansas Appellate Courts in *Bergstrom, Casco, Tyler, Redd, McCready*, and *Mitchell*. An example from the Kansas Workers Compensation Board is the *Fernandez* decision, which is currently on appeal to the Kansas Supreme Court. Both newer and older case law have resulted in Kansas employers paying for compensation for physical conditions which were not caused by the work the employee performed for the employer against which the claim has been made.

Workers compensation is, generally, a system of statutes originally passed approximately 100 years ago. The Kansas Workers Compensation Act was intended to remedy inequities to both employers and employees which arose from the common law which applied to work related injuries prior to passage of the Act. The Act is intended to operate without consideration of fault either on the part of the employee or the employer. Specific benefits are enumerated in the Act and the system is intended to provide benefits in a shorter period of time than typically occurs in general civil litigation. The benefits allowed under the Act are more specific and predictable than damage awards in civil litigation. The Workers Compensation Act is intended to be the exclusive remedy for employees who are injured by accidents arising out of and in the course of their employment. Judicial interpretations of the Act, including the cases to which reference is made above, have had the effect of frustrating the legislative intent associated with the Act and have resulted in the rewarding of employees who act in bad faith regarding seeking gainful employment following an injury.

The Compromise Bill negotiated between business and labor makes changes intended to ensure that Kansas employers do not pay workers compensation benefits for conditions which are not the prevailing factor in causing an accidental injury. The Compromise Bill addresses the Appellate Court decisions referred to above, including the *Bergstrom* and *Tyler* decisions. The proposed legislation would amend the Act so that an employee only qualifies for work disability benefits based on the loss of wage earning capacity caused by the work related accidental injury. The Compromise Bill also addresses the Board's *Fernandez* decision by disallowing work disability benefits to employees who are unable to enter into a valid post-injury contract of employment.

The purposed legislation provides a new procedure by which the parties to a claim may finalize future medical, whereas under current law future medical is left open indefinitely as a matter of law if the parties do not agree otherwise. The legislation also provides for a procedure to dismiss aging claims in which there has been no activity for a period of years. The requirements surrounding the employee's obligation to provide notice of an accident to the employer have been modified to provide for more predictability regarding such issues. As noted above, the provisions for work disability benefits in claims involving general bodily disabilities have been changed to ensure that such benefits are provided only in situations where the claimant has truly experienced the loss of wage earning capacity resulting from the work related injury and not some other cause, such as voluntary resignation or termination for cause. The provisions of the Act concerning pre-existing disability have also been retooled so that an employer

against whom a claim is made does not end up providing benefits for a condition which is unrelated to the claimant's accidental injury.

The Compromise Bill which resulted from negotiations between the representatives of Labor and Industry makes necessary changes to the statutory language with equitable results to both employees and employers.

FINAL MATTERS

There is an error in Substitute for HOUSE BILL No. 2134. K.S.A. 44-510e(c)(ii) should read "the employee sustained a post-injury wage loss, as defined in K.S.A. 44-510e(a)(2)(E), ***of at least*** ten (10) percent which is directly attributable to the work injury and not to other causes or factors" (page 25, lines 30-33).

Kansas Economic Progress Council
Suite 200
212 West 8th
Topeka, Kansas 66603

Testimony on HB 2134
Senate Commerce Committee
March 8, 2011

Good afternoon, Senator Wagle and members of the committee. Thank you for the opportunity to submit testimony today in support of House Bill 2134, a bill which would enact comprehensive workers' compensation reform

I'm Bernie Koch with the Kansas Economic Progress Council, a statewide not for profit organization of businesses, trade associations, and chambers of commerce. We support pro-growth policies for communities and the state.

Our organization believes that reliable legal systems are a significant basis for economic growth. These systems provide dependable enforcement of private contracts, protection of private property rights, effective law enforcement and an absence of corruption. Part of our legal system which the government wisely chose to implement has been the workers' compensation system, a method of fairly compensating workers who are injured on the job. The system is really an agreement between business and labor to avoid constant legal actions when a worker is injured.

We also support public policy which encourages economic freedom, the freedom of business to operate as reasonably as possible, unfettered by unnecessary bureaucracy.

We believe House bill 2134 deals with both of these important basics of a free enterprise system: a reliable legal system and economic freedom. Our policies for 2011 support "stability and certainty in the state's workers' compensation system. KEPC supports changes to clarify court decisions which have eroded previous reforms."

We prefer the original version of this bill, which was a compromise worked out between business and labor negotiators. We urge your serious consideration of House Bill 2134 in that version and its ultimate passage.

The Kansas Economic Progress Council is a not for profit designed to draw together organizations and businesses interested in advancing sound public policy in Kansas to enhance our state's quality of life.

Kansas Economic Progress Council
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KING
KAHSA INSURANCE GROUP

To: Senator Susan Wagle, Chair, and Members
Senate Committee on Commerce
From: Kevin McFarland, President
Date: March 8, 2011

Testimony in Support of House Bill 2134

The Kansas Association of Homes and Services for the Aging (KAHSA) represents 160 not-for-profit nursing homes, retirement communities, hospital long-term care units, assisted living facilities, senior housing and community service providers serving over 20,000 older Kansas every day.

The KAHSA Insurance Group (KING) is a group-funded workers' compensation pool that provides workers compensation insurance coverage and loss prevention services for 60 KAHSA members. KING has been in operation for over 20 years.

We ask for your support of House Bill 2134 in either the original form or the version passed by the House. HB 2134 provides positive reforms to the Kansas workers' compensation system for both the employee and the employer.

Primarily because of recent poor court decisions (Bergstrom) the cost of work disability claims have skyrocketed and have increased the workers compensation premiums to many Kansas nursing homes because of rising experience modification factors.

The bill protects and reinforces fairness in the workers' compensation system. An important provision of the bill is that it clarifies that the workplace incident must be the prevailing factor behind the injury – not a pre-existing condition.

As large employers in many Kansas communities the cost of workers' compensation is a significant expense for nursing homes and retirement communities. Approximately 50% of reimbursement to Kansas nursing homes for the care of elders comes from the state Medicaid program. Without changes offered in the bill the state's cost for Medicaid reimbursement may also increase. House Bill 2134 provides reforms that will protect workers who are legitimately injured through the course of their employment and lessen number of claims not intended to be paid in the Kansas workers' compensation system.

Thank you for your favorable consideration of House Bill 2134.

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Legislative Testimony before the Senate Commerce Committee
By: Eric Stafford, Senior Director of Government Affairs, Kansas Chamber of Commerce

Madam Chair Wagle and members of the committee, my name is Eric Stafford and I am the Senior Director of Government Affairs for the Kansas Chamber.

On behalf of the coalition of 26 business organizations included at the bottom of my testimony, I would like to express our support for HB 2134 which brings substantial positive reform to Kansas' workers compensation system, for both the employee and the employer.

Our coalition business groups support HB 2134 in both forms- the version which passed the House, as well as the original compromise. There are some changes to the amended House version which are necessary if that is the proposal adopted by this committee. Most of these changes can be considered technical in nature. We will leave it to the will of the committee as to which version to accept.

In the fall of 2010, the Kansas Chamber, Kansas Society of Human Resource Management and Kansas Self-Insurers Association began discussions with representatives from labor and the plaintiff's bar in an attempt to find a compromise on work comp that could be presented to the legislature in 2011.

Thanks to the hard work of attorneys on both sides, we are proud to present you with the results of the lengthy negotiations between those attorneys. Let us be clear that nothing in the compromise agreement was removed by the House. Only additions were made. This bill ensures fairness to the system for both the employer and injured worker. Workers compensation is a unique system of protection offered by employers to employees through statutory guidelines.

Significant workers compensation reform hasn't taken place since 1993 and is long overdue after a series of court decisions have eroded the legislature's intent. HB 2134 makes several significant steps to return the Kansas work comp system back to a system that truly protects the injured worker and employers by ensuring that legitimate claims are compensated and injuries never intended to be compensable are not.

First, this bill strengthens the threshold of entry into the work comp system through what is known as the "prevailing factor test." Under today's "one iota" method of entry, if the employee can show "one iota" of difference in their body caused by the workplace injury, that worker will be compensated. HB 2134 establishes provisions which state that the workplace incident must be the prevailing factor behind the injury.

Second, this bill reverses several court cases which significantly altered the intent of the work comp system. We start by fixing the *Bergstrom* case. Employees again have a good faith obligation to look for work. If they do not find work, a judge can impute a wage. Next, we address the *Tyler vs. Goodyear* case.

Senate Commerce Committee
Date: March 9, 2011
Attachment #

There must be a nexus between the workplace injury and the wage loss. The *Fernandez* case is also corrected. You must be eligible for a valid contract of employment to be eligible for work disability.

While these are a few of the positive changes for employers, we also focus on the changes taking place in this legislation which benefit the injured worker. The business community was willing to increase caps to benefit legitimately injured workers. This legislation raises the Permanent Partial and Permanent Total caps by $30,000 each. The death benefit also increases from $250,000 to $300,000.

Additionally, not only do we address court decisions for the employer, but also the *Casco* decision for the injured worker, which took a bilateral injury from a "body of the whole" injury to a "scheduled injury" resulting in significantly fewer benefits for the worker. This legislation will essentially reverse that case.

In conclusion, many long hours of negotiations took place to craft what the business community feels is a fair compromise for both sides, and we would ask for your support in passing HB 2134.

Thank you,

Associated Builders and Contractors, Heart of America Chapter
Associated General Contractors of Kansas
Builders' Association of Kansas City
Greater Topeka Chamber of Commerce
Kansas Agri-business Retailers Association
Kansas Association of Ethanol Processors
Kansas Association of Insurance Agents
Kansas Building Industry Association
Kansas City Chapter, Associated General Contractors
Kansas Contractors Association
Kansas Chamber of Commerce
Kansas Cooperative Council
Kansas Grain and Feed Association
Kansas Hospital Association
Kansas Livestock Association
Kansas Restaurant & Hospitality Association
Kansas Roofing Association
Kansas Self-Insurers Association
Kansas Society of Human Resource Management
Lenexa Chamber of Commerce
National Federation of Independent Business/Kansas
Northeast Johnson County Chamber of Commerce
Overland Park Chamber of Commerce
Topeka Independent Business Association
Wichita Independent Business Association
Wichita Metro Chamber of Commerce